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ROGER SAMMONS V. MINE SERVICES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
June 5, 1984

ROGER E. SAMMONS

v. Docket No. SE 82-15-D

MINE SERVICES CO., a
wholly-owned subsidiary
of Drummond Coal Co.

DECISION

This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982), and involves an operator's alleged discriminatory discharge of a miner. A Commission administrative law judge concluded that the operator did not violate the Mine Act by discharging the miner, and dismissed the miner's discrimination complaint. 4 FMSHRC 1713 (September 1983)(ALJ). We affirm the judge's decision.

Mine Services Company, a wholly-owned subsidiary of Drummond Coal Company, performs construction work at surface coal mines and coal preparation facilities. The complaining miner, Roger Sammons, was employed as an ironworker by Mine Services at its Short Creek, Alabama, surface coal mine construction project from August 27 through September 21, 1981. Mine Services, a signatory to the National Coal Mine Construction Agreement ("the Construction Agreement") between the United Mine Workers of America ("UMWA") and the Association of Bituminous Contractors, hired Sammons and six other ironworkers from a UMWA District Panel. Under Art. XVI(h) of the Construction Agreement, an employer could refer a new employee back to the panel during the first 30 days of employment "if the [e]mployer decides that the employee is not able to step into and perform the work of the job..."

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Mine Services first utilized Sammons to load and unload steel beams. Sammons then was assigned to work as an ironworker connector 1/ for about two weeks at a partially completed "sample house," a structure where mined ore was to be sorted and sampled. He worked with Billy Canada and Donald Gravlee, also connectors.

In early September, Sammons, acting as Union Grievance Committeeman, asked Project Superintendent Edward Bates to post certain boom truck operator jobs for bidding, rather than unilaterally assigning such operators. Sammons stated that qualified operators were needed for safety reasons. Boom trucks were used to load steel onto flatbed trucks for transportation to work areas. Bates, who considered Sammon's request governed by the Construction Agreement, informed Sammons that the agreement allowed Mine Services a grace period of 60 days before the jobs had to be posted for bidding, and that the two operators Bates had initially assigned to the jobs were qualified. Sammons also complained that the safety belt provided to him by Mine Services was too large and did not fit properly. Sammons was permitted to use his own safety belt after this complaint.

About September 14, 1981, after construction on the sample house was almost completed, Superintendent Bates assigned Sammons, Canada, Gravlee, and other connectors to do connecting work on a large refuse bin. The structure was to consist of a rectangular paneled bin tapering on its underside to a dump chute. The bin was to be supported above ground level by four vertical steel beams located at the four corners of the bin and reinforced on each side by two sets of diagonal steel braces. The connecting work involved on the refuse bin was more complicated than that done on the sample house.

As the braces for the refuse bin were hoisted by crane, the connectors were expected to guide the braces into place and to bolt the ends of the braces to the vertical beams, using bolt holes pre-cut in the steel. This work sometimes required the connectors to climb and to straddle or stand on the steel about 30-32 feet above the ground. Ordinarily, connectors were expected to make such connections by climbing the steel. On occasion, the pre-cut holes in the diagonal braces were "out of plumb" and did not match up with the holes in the vertical steel beams. In such structural steel members

1/ An ironworker connector steadies and guides or beams as they are hoisted into position by crane or other means for the framework of a building or other structure. See Webster's Third New International Dictionary (Unabridged) 481 (1971). Typically, the connector installs

at least one bolt into each end of the steel member to connect it in place. A "bolt-up man," a lower-paid ironworker, finishes the bolting work after the initial connection.

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cases, it would be necessary for the connectors to pull or pry the steel members into alignment by inserting a spud wrench through the holes (a procedure called "spudding the beams") or to burn new holes in the steel order to make a proper connection. New holes could be burned by a connector while working on the steel or from a basket (a structure with posts and handrails) hoisted by a second crane. However, burning new holes was a last resort. If too many extra holes were burned, the building would be out of plumb when complete.

After observing the connectors' work on the refuse bin for the first few days following their assignment to that project, Bates became dissatisfied with their slow progress. The foreman on the refuse bin project complained to Bates that "he couldn't get [the refuse bin] together with the people that he had." Tr. 91. Accordingly, on the afternoon of September 16, 1981, Bates met with Sammons, Canada, and Gravlee, the three connectors whose lack of progress was the focus of Bates' concern, and expressed disappointment over the slowness of their work. According to management's contemporaneous notes of the meeting, Sammons responded that the connectors needed another crane and a basket from which to make the connections in order "to speed it up." Sammons then stated, "The going was slow mainly because of a safety situation." Bates replied, "The safety part of the job I agree with but not with extra equipment" (Bates testified at the hearing that connecting work was not to be performed out of a basket except under abnormal conditions.) Gravlee conceded that he could not do the connecting work. Bates thanked Gravlee for his "honest" answer and stated, "I want honest answers as to the progress of the erection. There were only four pieces of iron hung today." Canada offered as an explanation the fact that the steel had been wet until approximately 9:45 a.m. Bates replied, "I understand about steel being wet. [Y]ou don't work on wet steel ever. The problem is I need connectors that can do the job." Sammons testified that he repeated his complaint that the safety belt supplied by Mine Services did not fit properly, and the notes of the meeting reflect that he also stated, "I won't do anything unsafe, if that means working slow, then that's the way I'll do it" Bates responded, "All I ask is that you give me your best shot." The record on the meeting contains no more specific testimony regarding safety. 2/

Bates tested all seven connectors two days later by observing and evaluating them as they performed connecting work on the refuse bin. Bates had Sammons and Canada erect one diagonal brace. Bates concluded that they did not appear to be comfortable on the steel and did not

2/ Sammons' contention on review that he also complained to Bates at this meeting that there were no taglines (a rope tied around the steel beams to pull them into place) is not supported by the record. It was Canada who complained, and he complained to a foreman, not to Bates.

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handle their tools properly. In a subsequent report to his superior, Bates stated, "They had difficulty with [the lower] connection, and wanted to burn holes. The connection was made but it was apparent they did not know exactly how to utilize their tools to the best advantage." Sammons, assisted by Canada, then moved to the middle section of the diagonal and made the connection at the "X" point of intersection between the two diagonal braces. However, contrary to what Bates believed should have been done next, Sammons did not proceed to climb to the top of the diagonal, where the brace was resting in place over a gusset plate, to make the needed upper connection, nor did he climb the diagonal to remove a loose "choker" (a wire rope connected to a crane that holds a steel member). Instead, Sammons and Canada started to hook a basket to the crane. 3/ Bates ordered them down. He did not ask why they needed the basket and they did not offer an explanation. Bates then directed Ralph Smith, another connector, to climb the diagonal to make the connection. Smith climbed the steel and discovered that the holes were out of plumb. The connection was eventually made by another connector working from a basket.

After the test, Bates concluded that of the seven connectors tested, two were good and two were acceptable, but that Sammons and Canada lacked the ability to perform as connectors. The remaining connector, Gravlee, admitted that he was afraid to climb the steel and later was allowed to bid on another, lower-paying job. Bates terminated Sammons' and Canada's employment on September 21, 1981, before their 30-day probationary period ended, by referring them back to the UMWA District Panel pursuant to the referral-back provisions of the Construction Agreement. Bates' personnel memorandum on the subject stated, "They do not perform as connectors" 4/

Sammons filed a discrimination complaint under the Mine Act with the Secretary of Labor on September 24, 1981. After the Secretary declined to prosecute the complaint on his behalf, Sammons filed his own discrimination complaint with this independent Commission pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3). The complaint stated:

3/ Sammons testified that he needed the basket because it was apparent that the holes were out of plumb and new holes would have to be burned in order to make the connection, and also because the diagonal was not secure enough to climb. Canada's testimony corroborates Sammons".

4/ Sammons and Canada filed grievances under the Construction Agreement after Bates referred them back. On October 19, 1981, after Sammons had filed his Mine Act discrimination complaint with the

Secretary of Labor, Mine Services and the UMWA local union settled the two grievances by agreeing that Mine Services would reinstate Canada with full pay and that Sammons' grievance would be withdrawn. Sammons' grievance was withdrawn by the local union and Canada was reinstated. Sammons filed a charge with the National Labor Relations Board regarding the union's withdrawal of his grievance. The record does not disclose the outcome of that complaint.

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While employed with [Mine Services, Inc., at] the Short Creek project, there were no complaints made to me about my work. I feel therefore that the only reason for me being relieved of my duties was the complaints which I made about getting safe operators, safety belts, building cages and getting taglines to be used on the larger pieces of steel.

At the hearing before the Commission administrative law judge, Sammons contended that he was discharged in retaliation for making safety complaints. In his post-hearing brief to the judge, Sammons' counsel suggested for the first time, with reservations discussed below, that Sammons also was discharged because he engaged in a protected work refusal during the September 18 test when he did not climb the upper end of the diagonal brace. In his decision, the judge characterized the major issue as whether Mine Services referred Sammons back because Bates believed him to be an incompetent connector, or in retaliation for Sammons' safety complaints. The judge concluded that none of Sammons' complaints was related to safety. He credited Bates' testimony that the boom truck operator complaint in early September was a labor-management dispute over the posting of jobs. He determined that Sammons' safety belt complaints were not safety complaints because Mine Services had not refused to provide safety belts. 4 FMSHRC at 1729-30. The judge further determined that Sammons' request for a basket at the September 16 meeting with Bates was not a safety complaint, but reflected a difference of opinion as to how connecting work should be done. 4 FMSHRC at 1730-31.

The judge also rejected Sammons' alternative argument that Bates terminated him because he engaged in a protected work refusal during the September 18 test. The judge stated that the evidence did not establish that Sammons was required to work in an unsafe manner or that he refused to work for reasons of safety. 4 FMSHRC at 1732-33. In short, the judge credited Bates' testimony as to his reason for referring Sammons back, over Sammons' contrary testimony. Finding nothing suspect in the referral back, the judge concluded that it was based solely on Bates' bona fide belief in Sammons' incompetence as a connector. 4 FMSHRC at 1733-34. Accordingly, the judge dismissed Sammons' discrimination complaint.

We note at the outset that the judge's decision fails to mention and does not apply this Commission's precedent in the area of discrimination law. This omission has needlessly complicated the task of review. We have carefully examined the judge's findings and the record and are satisfied that his decision is consistent with our

precedent in principle and in result. However, for the sake of clarity, we reiterate the basic analytical guidelines in this field.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected

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activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C. Cir. (April 20, 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___. 76 L.Ed. 2d 667 (1983).

The judge found that Sammons had not engaged in any protected activity, either in the form of safety complaints or a work refusal, and that he was referred back to the District Panel during his probationary period of employment solely because Bates believed him to be an incompetent connector. Thus, in effect, the judge concluded that Sammons had failed to prove either element of the prima facie case. Sammons has challenged both of these findings.

Sammons contends that the judge erred in holding that his complaint in early September regarding the posting of the boom truck operators' jobs, his complaints that Mine Services had provided him with an illfitting safety belt, and his generalized complaint at the September 16 meeting with Bates that the connectors needed a basket from which to make the connections on the refuse bin were not protected. We agree that the judge erred in certain aspects of his analysis of these complaints. In part, the judge concluded that Sammons' boom truck and safety belt complaints were not protected because there was no showing that there was, in fact, a safety problem and because Mine Services adequately addressed whatever problem was in issue. That there may have been no objective underlying safety

problem does not invalidate a miner's good faith reasonable complaint. Robinette supra, 4 FMSHRC at 811-12. Similarly, the fact that an operator addressed a safety problem does not remove the Act's protection from a preceding complaint. The judge also appears to have given weight to the fact that Sammons had filed no grievances or written complaints with governmental agencies.

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The filing of such formal complaints is not a prerequisite to making a protected safety complaint to an operator. Nevertheless, because of our ultimate conclusion that these complaints were not related to Sammons' dismissal, we do not believe it is necessary to determine which of them were protected, but assume, for purposes of this decision, that they all were.

As to the other protected activity alleged by Sammons, we affirm the judge's conclusion that Sammons did not engage in a protected work refusal. In our Pasula and Robinette decisions, we held that under the Mine Act a miner may refuse to engage in work where he has a reasonable, good faith belief in a hazardous condition, and we have applied this doctrine in various factual contexts to extend the Act's protection to miners' work refusals. See for example, Secretary of Labor (MSHA) v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984). Our cases contemplate, however, that the miner has engaged in some form of conduct or communication manifesting an actual refusal to work. As noted above, Sammons did not raise a work refusal theory in this case until after the hearing, and even then his counsel candidly conceded the difficulty of applying that theory to the facts:

Our position is that this is a retaliation [for safety complaints] case rather than a work refusal case. This is not a work refusal case simply because Sammons never declined an assignment and thereby disrupted production; he performed every task given to him. On the other hand, because at least from management's perspective production was adversely affected, it may be possible to analyze certain incidents as a form of protected work refusal, such as the so-called "refusal to climb" ... on the refuse bin....

Post-hearing brief for the complainant 9-10.

Only Sammons' attempt during the September 18 test to use the basket for the upper connection on the diagonal brace could be characterized as a possible work refusal. However, Sammons was performing his assigned task at the time and never suggested that he was refusing to carry out that task. Bates merely believed that Sammons should have climbed the steel to remove a loose choker and to move to the upper end of the brace preparatory to making the connection.

Even were we to treat Sammons' conduct during the erection of the brace as an implied refusal to perform the work in the manner

contemplated by management, we could not conclude that it amounted to protected activity under the Mine Act given the lack of any expression of a safety concern by Sammons at the time. We have held that a miner refusing to work on the basis of a good faith, reasonable belief in a hazard "should ordinarily communicate, or at least attempt to communicate,

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to some representative of the operator his belief in the ... hazard at issue" Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982). See also Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982)(approving generally the Dunmire and Estle rule requiring communication of a safety concern in connection with a work refusal). On September 18, Sammons neither expressed a safety concern, complained about the conditions for making the connection, nor told Bates after the fact why he had not climbed the diagonal. His failure to communicate any safety concern to Bates leads us to agree with the judge that Sammons' attempt to use a basket instead of climbing the" diagonal on September 18 merely reflected a difference of opinion--not pertaining to safety considerations--over the proper way to perform the task at hand. Accordingly, we cannot conclude that Sammons engaged in a protected work refusal during the September 18 test.

Because we have assumed *arguendo* that Sammons made protected safety complaints, we must decide whether he established the necessary causal connection between the complaints and Mine Services' referral back of Sammons to the panel. We conclude that substantial evidence supports the judge's conclusion that Bates discharged Sammons solely for his perceived incompetence.

Bates' belief in Sammons' incompetence as a connector was based on reasons that the judge found credible and convincing. Bates was seriously concerned over the slow erection of the refuse bin and was determined to improve the situation. There is no evidence in this record to contradict Mine Services' view that progress was unacceptably slow. As the construction supervisor, Bates was authorized and qualified to evaluate his employees. After observing and testing all the connectors, he concluded that Sammons and Canada did not perform competently. Specifically, Bates believed that they were not comfortable on the steel, were afraid to climb, and did not handle their tools to best advantage.

The judge relied in part, on Bates' testimony concerning his evaluation of Sammons competence and his right under the Construction Agreement to refer back an unsatisfactory employee during the 30-day probationary period. 4 FMSHRC at 1719-20, 1733-34. The judge credited the testimony of Bates over that of Sammons. On review, Sammons has not persuaded us that anything in the record would justify our taking the extraordinary step of overturning this credibility resolution. 5/

5/ In cases involving an alleged discriminatory discharge, the task of

the Commission and its judges is to determine, based on the record, whether the motivation for a discharge was discriminatory, not whether it was fair or based on a correct interpretation of events leading up to the discharge. In fact, after Sammons and Canada were ordered down on September 18, the connection had to be made by use of a basket. We do not by this decision conclude that Sammons was incompetent, merely that Bates' belief that he was not competent motivated the referral back to the panel.

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Finally, even if a reasonable inference could be drawn that the referral back were motivated in any part by protected activity, our conclusion would be no different. The judge analyzed certain aspects of the evidence from the standpoint of a "mixed motive" case (see *Haro v. Magma Copper Company*, supra), and rejected Sammons' contention that, absent his alleged protected activity, he would not have been referred back. The judge found, in effect, that Mine Services' evidence was so strong that it had affirmatively defended by proving that Sammons would have been referred back because he was perceived to be an incompetent connector. 6/

For the foregoing reasons, we affirm the judge's dismissal of Sammons' discrimination complaint.

6/ We agree with the judge's rejection Sammons' argument that Mine Services' reassignment of Gravlee and reinstatement of Canada (n. 4 supra) reflected discriminatory treatment of Sammons. 4 FMSHRC at 1731-32. Gravlee was allowed to bid on another, lower-paying job because he admitted that he could not perform as a connector and was slowing down the work on the refuse bin. This evidence does not add to Sammons' case. Mine Services' personnel director testified that during the course of processing the Sammons and Canada grievances, management determined that Canada was more qualified on paper than Sammons and had a stronger case for reinstatement. Mine Services therefore agreed to settle Canada's case by reinstating him. Sammons has not demonstrated in this proceeding that the reinstatement of Canada is proof of discriminatory treatment within the protection of the Mine Act.

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